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## BINA PURI VENTURES SDN BHD

**v.**

## LEE POH HENG & ANOTHER CASE

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NOS: D6-22-803-1999 & D6-22-216-2005]
15 AUGUST 2011

C ***COMPANY LAW:*** *Transfer of shares - Challenge to validity of transfer - Charging order - Charging order nisi obtained against shares of judgment debtor - Shares transferred out by backdating Form 32A and Board's circular - Legality of transfer - Beneficial interest in shares - Companies Act 1965, ss. 103(1), 158(4), 169(6), 171*

D

The plaintiff ("judgment creditor") obtained on 29 January 2010 a monetary judgment against the defendant ("judgment debtor"). The judgment was obtained after a full trial. The appeal process to Court of Appeal and leave for appeal to Federal Court were dismissed respectively. The judgment creditor by way of *ex parte* application successfully applied for a charging order on 5 August 2010 in relation to shares held by the judgment debtor in eleven companies including Hamay Industries Sdn. Bhd. ("Hamay"). The judgment debtor argued that of the 400,000 shares that the charging order *nisi* was directing at, 399,998 shares ("Sale Shares") in Hamay were sold to his son, Lee Chin Yee, on 15 January 2010. The facts showed however that the instrument of share transfer in Form 32A dated 15 January 2010 was not witnessed at the material time when it was executed and that the same was only stamped on 29 December 2010. It was also evident that, when the charging order *nisi* was made on 30 September 2010, there were no shares owned by judgment creditor beneficially. The judgment creditor in the circumstances *inter alia* applied for: (i) the charging order *nisi* to be made absolute against the judgment debtor's 400,000 units of shares in Hamay pursuant to O. 50 r. 2 and r. 6 of the Rules of the High Court 1980 (RHC); (ii) the transfer of the sale shares from the judgment debtor to Lee Chin Yee be cancelled; and (iii) the register of members of Hamay be rectified by striking out the name of Lee Chin Yee as holder of the sale shares and substituting *in lieu* the name of the judgment debtors holder of the sale shares.

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The judgment debtor argued that even if the legal ownership of the sale of shares had not passed until 29 December 2010 when Form 32A had been witnessed and stamped, the beneficial ownership of the Sale Shares had effectively passed to Lee Chin Yee on 15 January 2010.

**Held (allowing judgment creditor's applications; dismissing judgment debtor's application to stay):**

**(1)** The Board's circular resolution approving the transfer of the sale shares dated 15 January 2010 had been back-dated and Form 32A effecting the said transfer too had been similarly back-dated. There is every likelihood that the said back dating was done after the service of the charging order *nisi* dated 30 September 2010 on the judgment debtor. (para 27)

**(2)** The purported Board circular resolution dated 15 January 2010 from Hamay merely stated the approval for the transfer of shares from the judgment debtor to his son, Lee Chin Yee. There was no evidence to show that any instrument of transfer let alone a "proper instrument of transfer" had been delivered to Hamay as mandated order under s. 103(1) of the Companies Act 1965 when the purported circular resolution was signed. (para 29)

**(3)** Both the father and son had gone to a great extent to ensure that this block of sale of shares was isolated from the grip of the judgment creditor by even stating in the "Directors Report" attached to the 2010 audited accounts ending 30 April 2010 that the son was the registered holder of the sale shares though the shares could not be registered until the transfer was stamped and that was not stamped until 29 December 2010. It can only be concluded that the said registration was done to take advantage of s. 158(4) of the Companies Act 1965. (para 33)

**(4)** The circumstances leading to the purported sale of the sale shares were highly suspicious. The judgment debtor was aware at all material times of the suit against him, and that, judgment had been obtained on 29 January 2010 against him. The judgment debtor knew that his appeal to the Court of

A Appeal had been unsuccessful and so was his leave to the Federal Court. The judgment debtor was aware of the charging order to show cause that was served at the registered office of Hamay. (para 42)

B **Case(s) referred to:**
*Hawks v. McArthur [1951] 1 All ER 22* ***(refd)***
*Inter Heritage (M) Sdn Bhd v. Asa Sports Sdn Bhd [2009] 2 CLJ 221; [2008] 1 LNS 567 CA* ***(refd)***
*Jin Sen Hong (1971) Sdn Bhd v. Khiing Sie Khuo (Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd, Intervener) [1988] 1 LNS 63 HC* ***(refd)***
C *Lin Ah Moy v. Lee Cheng Hor & Ors [1969] 1 LNS 96 FC* ***(refd)***
*Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA* ***(refd)***
*Re Fraser & Neave Ltd; Tan Keng Siong v. Tan Hock Kiang & Ors [1967] 1 LNS 146 FC* ***(refd)***
*Re Paradise Motor Co Ltd [1968] 2 All ER 625* ***(refd)***
D *Roberts Petroleum Ltd v. Bernard Kenny Ltd (in liquidation) [1982] 1 All ER 685* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 103(1), 158(4), 169(6)(g)(iii), 171
Rules of the High Court 1980, O. 50, rr. 1, 2, 3(c), 5(1), 6, 11
E Stamp Act 1949, ss. 69(2)

Companies Act 1948 [UK], s. 75

**Other source(s) referred to:**
*Boyle and Birds' Company Law*, p 316
F Kang Shew Meng, *Handbook on Company Secretarial Practice in Malaysia*, 2005, 4th edn, LexisNexis, pp 897-899
Santhay Rachagan, Janine Pascoe and Anil Joshi, *Principles of Company Law in Malaysia, Malayan Law Journal 2002*, chapter 9, p 250
Walter C M Woon, *Company Law, FT Law & Tax Asia Pacific*, p 296

G *For the judgment creditor/applicant - Datuk Ben Chan (Loh Mei Ching with him); M/s Mah-Kamariyah & Philip Koh*
*For the judgment debtor/respondent - Anantha Krishnan; M/s Anantha Krishnan*

H *Reported by Anesa Karisma*

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## JUDGMENT

**Lee Swee Seng JC:**

### Prologue

**[1]** There are various modes of execution against a judgment debtor. A not so common mode is that of a charging order against shares held by a judgment debtor in a company. The judgment creditor here obtained a charging order nisi against the shares of the judgment debtor in a company. In the *inter parte* hearing to make the charging order absolute, the judgment debtor said that his beneficial interests in the shares had passed to his son. That of course calls for a closer scrutiny both with respect to the point in time of the passing of beneficial interests in the shares as well as the purpose behind the transfer. The father-son relationship carries with it a certain connotation and complexion that calls for curial examination. Is it a camouflage designed to cocoon the transaction from being challenged or is it a *bona fide* commercial transaction?

### Problem

**[2]** The judgment creditor had on 29 January 2010 obtained a monetary judgment againts the judgment debtor which remains unsatisfied for the sum of RM38,769,629.32 as at 29 January 2010 together with interest at 8% per annum from 30 January 2010. The judgment was obtained after full trial and appeal to Court of Appeal had been dismissed. Further leave to appeal to Federal Court had also been dismissed.

**[3]** The judgment creditor applied for a charging order by way of an *ex parte* application on 5 August 2010 in respect of shares held by the judgment debtor in 11 companies including Hamay Industries Sdn Bhd (Hamay).

**[4]** The judgment debtor contended that out of the 400,000 shares that the charging order nisi is directed at, 399,998 shares (sale shares) in Hamay were sold to his son Lee Chin Yee in January 2010 for RM39,998.80 such that when the charging order nisi was made on 30 September 2010, there were no shares which beneficial interests still lie with the judgment creditor in company.

**[5]** The relevant cause papers were served on Hamay and the solicitors for the judgment debtor before the *inter partes* hearing on 17 December 2010. On 17 December 2010 the court also made a charging order absolute against the judgment debtor's shares in ten other companies except for the 400,000 shares in Hamay.

**[6]** The shares transfer form was dated 15 January 2010. The instrument of transfer in Form 32A was not witnessed at that material time when it was said to have been executed. However it was stamped only on 29 December 2010. In other words the stamping was done only after the issue was raised at the first hearing on 17 December 2010 and after the Show Cause Order.

## Prayer

**[7]** The judgment creditor now applies for the charging order nisi to be made absolute against the judgment debtor's 400,000 units of shares in Hamay pursuant to O. 50 r. 2 and r. 6 of the Rules of the High Court 1980 (RHC).

**[8]** The judgment creditor also prayed for an order that the transfer of the 399,998 units of ordinary shares in Hamay from the judgment debtor to his son Lee Chin Yee on 15 January 2010 and effected on 29 December 2010 be cancelled.

**[9]** The judgment creditor also prayed for a further order that the register of members of Hamay be rectified by reversing and striking out the name of Lee Chin Yee as holder of the 399,998 units of ordinary shares and by substituting *in lieu* thereof the name of the judgment debtor as holder of the said shares with immediate effect.

## Principles

**[10]** It is helpful at the outset to remind ourselves of the broad principles applicable in the *inter partes* hearing to show cause why the charging order nisi should not be made absolute as succinctly summarised by Lord Brandon Of Oakbrook in the Court Of Appeal, Civil Division in *Roberts Petroleum Ltd v. Bernard Kenny Ltd (In liquidation)* [1982] 1 All ER 685 at pp. 690 and 691:

> I do not propose to examine individually these various authorities cited to us, the outcome of which necessarily depended in the end on the particular facts of each particular case. I shall rather try to distil from those authorities the principles of law which they appear

to me collectively to establish. In cases where a charging order being made absolute is not precluded by a winding-up order, those principles can, in my view, be summarized as follows:

(1) The question whether a charging order nisi should be made absolute is one for the discretion of the court.

**(2) The burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor.**

(3) For the purpose of the exercise of the court's discretion there is, in general at any rate, no material difference between the making the absolute of a charging order nisi on the one hand and a garnishee order nisi on the other.

(4) In exercising its discretion the court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi.

(5) The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say the judgment creditor, the judgment debtor, and all other unsecured creditors.

(6) The following combination of circumstances, if proved to the satisfaction of the court, will generally justify the court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgment debtor is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding.

(7) In the absence of the combination of circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute.

In summarizing the relevant principles in this way, I have deliberately confined myself to cases like the present one, in which there is no allegation of conduct amounting to trickery on the part of the judgment creditor who has obtained an order nisi ... (emphasis added)

**[11]** Order 50 r. 1 RHC provides that the court shall unless it appears that there is sufficient cause to the contrary, make the order absolute with or without modifications.

**[12]** As the crux of the matter of the effectiveness of the charging order would be dependent on when there was an effective transfer of the sale shares we will have to go back to basic principles.

**[13]** The relevant provision is s. 103(1) of the Companies Act 1965. The learned authors of Principles of Company Law in Malaysia, Malayan Law Journal 2002, Santhay Rachagan, Janine Pascoe and Anil Joshi observed in chapter 9 at p. 250 the following:

> Section 103(1) prohibits a company, notwithstanding anything in its articles, from registering a transfer unless a proper instrument of transfer in the prescribed form has been delivered to the company. This requirement ensures that stamp duty on transfers of shares will be paid in all cases and prohibits oral transfers on which stamp duty is not payable. Section 103(1) of the Act would presumably override Table A art. 20 which states that an instrument in writing in any usual or common form or in any other form that the directors approve may be used.
>
> The application of s. 103(1) was indirectly considered by the Court of Appeal in the case of *Ayer Molek Rubber Co Bhd & Ors v. Insas Bhd & Anor* [1995] 2 MLJ 734. This appeal was primarily concerned with the procedural rules of the High Court, which in the view of the Court of Appeal were abused by the respondent. The Court of Appeal held that the respondent should have brought to the attention of the trial court the fact that a purported transfer of shares is not possible when there is no delivery of a proper instrument of transfer of shares to the company as required by s. 103(1) ...

**[14]** Tan Ah Tah, FJ, in the Federal Court Civil Appeal, (Singapore) in *Re Fraser & Neave Ltd*; *Tan Keng Siong v. Tan Hock Kiang & Ors* [1967] 1 LNS 146; [1967] 2 MLJ 282 at p. 284 observed:

> As the wife is claiming title to the stock she must bring her case within the principle enunciated in the following passage from the judgment of Warrington LJ. In *Re Williams* [1917] 1 Ch 1 at p. 8:
>
> > Claiming as she does as a volunteer and alleging that the assignor made this gift to her, she can only succeed if she can show that the assignor did everything which according to the nature of the property comprised in the assignment was necessary to be done in order to transfer the property and render the assignment binding upon him.

> I have, for the reasons which I have already indicated, stated my view that the transfer form was not in conformity with article 50 in that the husband had not signed the transfer in the presence of an attesting witness. In these circumstances it is, in my opinion, impossible to say that the husband had done everything that was required to be done by him in order to transfer effectually the title in the stock from himself to his wife. It was necessary for him to sign the transfer form in the presence of a competent witness and this he had not done.

**[15]** The prescribed form for the instrument of transfer is Form 32A of the Companies Regulations 1966 and it requires the signatures of both the transferor and the transferee to be witnessed.

**[16]** Rule 9A of the regulations provides:

> A reference to a **proper instrument of transfer** in the prescribed form of shares or debentures in section 103(1) of the Act is a reference to an instrument that is duly completed in accordance with or to the effect of Form 32A set out in the Second Schedule to these Regulations. (emphasis added)

**[17]** Not only must the Transfer Form in Form 32A be duly witnessed, it must also be properly stamped. In *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, the English Court of Appeal in interpreting s. 75 of their UK Companies Act 1948 which is similar to our s. 103(1) said at p. 630 H as follows:

> ... but we do not consider that a "proper instrument" necessarily means an instrument complying with the formalities prescribed by the articles; indeed, the section includes a case in which the articles may not provide for any transfer by instrument. Having regard to the purpose of the section, we would construe the phrase as meaning an instrument such as will attract stamp duty under the relevant fiscal legislation.

**[18]** The learned authors in *Boyle and Birds' Company Law* at p. 316 commented:

> ... the Companies Act 1948, section 75 provides that, notwithstanding anything in the articles, a 'proper instrument of transfer' must be delivered to the company. Otherwise the company is prohibited from registering the transfer. This phrase means a written instrument such 'as will attract stamp duty under the relevant fiscal legislation'; it does not carry any further implication as to the form of the transfer. *Re Paradise Motors Co.*

*Ltd* [1968] 1 WLR 1125 at p. 1141 (CA). As a result of section 75, an oral transfer is ineffective even if the articles purport to make it effective. Furthermore, a clause in the articles purporting to effect an automatic transfer of shares in stipulated circumstances without any instrument of transfer (eg, from a deceased member to his widow as a beneficial holder) is invalid. *Re Greene* [1949] Ch 333.

**[19]** In applying the above principles to the determination in the present case as to whether the transfer of the sale shares in Hamay was effective as at the date the charging order to show cause was obtained, we must keep in the forefront of our discussion the following key dates:

1. 15 January 2010 – the purported date for the transfer of the sale shares in Hamay from the judgment debtor to his son;
2. 30 September 2010 – the charging order to show cause;
3. 29 December 2010 – the date of stamping of Form 32A.

**[20]** Learned counsel for the judgment creditor, Mr Ben Chan submitted that under O. 50 r. 5(1) RHC if the disposition of the sale shares was done after 30 September 2010, then it is not valid as against the judgment creditor as the charging order to show cause has the effect of restraining such a transfer until the order is dissolved or discharged. That issue would turn on whether there was a valid disposition of the sale shares effected prior to 30 September 2010.

## Whether The Purported Board's Circular Resolution Was Valid

**[21]** Learned counsel Ben Chan submitted as his first ground on why the charging order nisi should be made absolute, the fact that the purported Board circular resolution was invalid. The purported Board circular resolution dated 15 January 2010 merely stated the approval for the transfer of shares from the judgment debtor to his son. There was no evidence to show that any instrument of transfer let alone a "proper instrument of transfer" had been delivered to Hamay as mandated under s. 103(1) when the purported circular resolution was signed.

**[22]** After hearing both the company secretary Mr Ooi Peng Han JDW 1 and the judgment debtor's son Mr Lee Chin Yee JDW 2, who both gave evidence at the request of the court, it is more probable than not, that the purported Form 32A produced by the judgment debtor and the related Board circular resolution approving the transfer of the sale shares were only executed and back-dated after the issue was raised at the first hearing of the show cause application on 17 December 2010.

**[23]** I concluded this based on the following circumstances taken cumulatively. The judgment debtor in his first affidavit in reply on 16 December 2010 did not at the earliest opportunity produce a copy of the purported Form 32A. It only surfaced after the issue was raised at the first hearing on 17 December 2010. When the purported Form 32A was produced the date of stamping in the stamp certificate (sijil stamp) was not legible. The stamp certificate with the legible date of 29 December 2010 was only obtained by the judgment creditor's solicitors after the request for inspection. Further, at the inspection it was also discovered that there were tippex marks appearing on the register of transfer of the sale shares purportedly written on 15 January 2010. The verb 'tippex' comes from the noun 'tippex' which is the trademark for a white fluid used to paint over an error so that it can be written over again. This is not denied by the judgment debtor's solicitors in their letter dated 21 March 2011 exhibited as exh. A4 in the affidavit of Ms MC Loh dated 5 April 2011.

**[24]** The company secretary Mr Ooi Peng Han JDW1 has about 20 over years experience as a company secretary. When cross-examined on why there are tippex marks on the register of transfer of shares with respect to the sale shares he said very conveniently that he had no idea what was the date before the white tippex marks as it was not done by him but by his stafff Fara. He insisted that even though there was a tippex or 'blanco' mark the date appearing as 15 January 2010 is the correct date. Under the crucible of cross-examination he continued to explain that he did not ask Fara why she did what she did and as if to distance himself from the act he said he did not know the original date. He however agreed that Fara entered the date after the stamping of the Form 32A. To the same question from the court after his counsel Mr Anantha Krishan had finished his

re-examination, the company secretary said that he did know and that he had asked Fara and she too did not know. Cautious to maintain his professionalism, he readily agreed with learned counsel Ben Chan under cross-examination that to tippex or 'blanco' a share transfer register book is a serious mater and that it could amount to falsification. He also agreed that usually the person who tippexed or 'blancoed' must initial beside the tippexed or 'blancoed' mark.

**[25]** Whilst I can accept that we all make typographical mistakes the proper way is to cross out the wrong date and to write over it the right date and initial across it. To a question from the court the witness agreed that it is unusual to cover a mistake and that it was the first time that Fara made such a mistake in covering up the mistake. Even in an electronic entry of register one can trace and track changes made to a register and also who had made the entry. It arises from that which is axiomatic that whilst one can be forgiven for making an inadvertent mistake one cannot escape the full force of the law for a cover up.

**[26]** It is often said that it takes another mistake to cover up a so-called mistake. Under cross-examination it was revealed that though the transfer was said to have been effected on 15 January 2010 when the stamping was only done on 29 December 2010, yet at Hamay's AGM on 30 November 2010 the judgment debtor Mr Lee Poh Heng was still registered as holding 400,000 shares in the company!

**[27]** I am constrained to conclude based on the above circumstances that both the board's circular resolution approving the transfer of the sale shares dated 15 January 2010 had been back-dated and that Form 32A effecting the said transfer too had been similarly back-dated. There is every likelihood that the said back-dating was done after the service of the charging order nisi dated 30 September 2010 on the judgment debtor. From the evidence of the company secretary it costs hardly RM240 for the penalty paid for a payment of stamp duty only on 29 December 2010.

**[28]** The learned author Kang Shew Meng on his book *Handbook on Company Secretarial Practice in Malaysia*, 4th edn, 2005, LexisNexis at pp. 897-899 the procedure for transfer of shares in a company is as follows:

21.5 Transfer Procedure

21.5.1 Private Company

Usually, the secretary (or the share registrar if any) is not concerned with the transfer of his company's shares until the Form 32A (ie form of transfer of securities) which has been duly stamped is actually received by the company. However, in a small private company, the secretary may be requested to prepare the Form 32A and may also be requested to arrange to stamp the Form 32A for the shareholders ...

The procedure involved is as follows:

(1) the transferor ... will first try to find a 'willing' buyer (the transferor);

(2) the transferor ... will execute a Form 32A by signing as a transferor and he shall then deliver to *[sic]* the transfer form together with the share certificate(s) for the said shares to the buyer in exchange for the payment of the share transfer;

(3) the transferee shall then present the Form 32A for stamping within 30 days after execution ...;

(4) after the Form 32A is duly stamped with the proper stamp duty, it shall be presented to the company with a request for it to be registered;

(5) the secretary will carefully scrutinise the Form 32A and the share certificate, verifying the following details ... (f) check that the appropriate stamp duty has been paid;

(6) as soon as possible ... the secretary shall present the transfer to the directors at a meeting of directors for approval. The board will decide whether to approve the transfer and a resolution will be made to that effect.

**[29]** I hold that the board circular resolution of 15 January 2010 had been back-dated to that date as for there to be a proper resolution to approve the transfer of the sale shares the Form 32A must be duly stamped and it was not so stamped until 29 December 2010. Indeed as pointed out by the learned author at p. 899 at the footnote 48 "Under the Stamp Act 1949 s. 69(2) any person whose office it is to enrol, register or enter in or upon any rolls, books or records any instrument chargeable with duty, enrolls, registers or enter such instrument not being duly stamped,

A he shall be liable to a fine not exceeding RM1,500. Thus, the company and the officer(s) personally may be liable to a fine of RM1,500 (maximum) if he registers a transfer that has not been properly stamped."

B **[30]** In *Inter Heritage (M) Sdn Bhd v. Asa Sports Sdn Bhd* [2009] 2 CLJ 221; [2008] 1 LNS 567 his Lordship Abdul Malik Ishak J. (as he then was) observed in the context of a back-dated certificate of occupation and we can extrapolate that to a back-dated resolution and an instrument of transfer as well at p. 338 C as follows:

> With respect, I must categorically state that any backdating is and should be construed as contrary to law ...,
>
> ... In my judgment, a certificate for occupation cannot, in law, D have retrospective effect notwithstanding that the difference may only be one day or four days, for that matter ... and at page 44:
>
> > ... And it is ideal to remember that the law does not countenance the back dating of the certificate for occupation - be it partial or temporary. Back dating is taboo, in law. E Pure and simple, it is prohibited.

**[31]** Not only was the instrument of transfer in Form 32A not duly stamped when it was purportedly presented to the Board for approval of the transfer, the Form 32A was also not complete as F it was not duly witnessed. The company secretary himself admitted that he signed as a witness only in December 2010 before it was sent for stamping on 29 December 2010. When asked under cross-examination why he didn't sign as a witness if the transferor and his son the transferee had signed before him, G he said that he did not witness their signatures because he would only do so when the transfer Form was presented for stamping. By answering the way he did he was not answering the question at all. It is like saying I was not there because I did not go or that I did not sign as a witness even though I did witness the H signature because I intend to sign later. He said he was waiting for the audited accounts for the year 2010 to be ready. He later proferred as a reason the fact that he wanted to wait until the April 2010 accounts were ready as he believed less stamp duty would be payable based on a lower profit made. That under I cross-examination was not to be as the company actually made a better profit in the 2010 accounts compared to the 2009 accounts.

**[32]** In any event the 2009 accounts had already been ready in January 2010 and the 2010 accounts in October 2010. Therefore there was no proper instrument of transfer in the prescribed form delivered to the company when the purported Board circular resolution was signed purportedly on 15 January 2010. I therefore held that there had been no proper and effective transfer of the sale shares from the judgment debtor to his son as at the date of the show cause order dated 30 September 2010.

**[33]** Both the father and son had gone to a great extent to ensure that this block of sale shares was isolated and insulated from the grip of the judgment creditor by even stating in the "Directors Report" attached to the 2010 audited accounts ending 30 April 2010 that the son was the registered holder of the sale shares though the shares could not be registered until the transfer was stamped and that was not stamped until 29 December 2010. It can only be concluded that the said registration was done to take advantage of s. 158(4) of the Companies Act 1965 that reads:

> The register of members shall be *prima facie* evidence of any matters inserted therein as required or authorized by this Act.

**[34]** By their actions both the father and son have exposed themselves to a possible prosecution under s. 169(6)(g)(iii) and punishable under s. 171 of the Companies Act 1965 and also to a penalty under s. 69(2) of the Stamp Act 1949.

**[35]** In spite of deft design to differently date defining documents, it all discloses a discernible attempt by the desperate duo to defeat the law. It is not unlike a comedy of errors committed in scurrying to cover up the truth and camouflaging the facts!

## Whether The Transfer Of The Sale Shares Was A *Bona Fide* Transfer

**[36]** The shareholdings in Hamay prior to the purported transfer were as follows:

| | |
|---|---|
| 1. Judgment Debtor | 400,000 shares |
| 2. Tay Cheng Eng (Wife) | 50,000 shares |
| 3. Lee Chin Wee (Son) | 50,000 shares |

**[37]** According to Lee Chin Yee, JDW2, he bought the sale shares from his father and he 'agreed to pay him RM39,999.80'. He said the sale took place on 15 January 2010. He said he signed a transfer form at the company secretary's office but could not remember what other documents he had signed. He could not even remember if he had signed the purported Board resolution dated 15 January 2010. Under further cross-examination, he said there was a possibility that he had also signed a document called "Trust Deed".

**[38]** He also said that on 30 November 2010 he bought 50,000 shares each from his mother (Tay Cheng Eng) and his brother Lee Chin Yee at RM1 per share. After the sales, he would now hold all the 500,000 shares in Hamay with the exception of two shares in the name of the judgment debtor. There is a discomforting disclosure on the purchase price of a controlling block of sale shares as opposed to a minority block of a combined 50,000 shares from the mother and brother. The purchase price for the controlling block was RM0.10 per share said to have been concluded in January 2010. The purchase of the minority block in November 2010 was RM1 per share. For the minority block to have cost more than the controlling block and that after only ten months difference does not seem to compute with common sense.

**[39]** A further scrutiny as to whether the price makes sense must be had by reference to the Net Tangible Assets (NTA) of Hamay to see if it is really an arm's length transaction. Learned counsel for the judgment creditor Mr Ben Chan submitted that the purported purchase consideration for the sale shares was far below the estimated NTA value (total assets – total liabilities) as follows:

1. RM0.41 per share: When based on the 2010 audited accounts, the estimated NTA value is RM204,648 (bundle B, p. 26);

2. RM 5.81 per share: Lee Chin Yee testified that when he applied for the UOB loan, Hamay's factory was valued at about RM3.5 million (bundle A, p. 25). Based on the 2010 audited accounts, the non-current assets (comprising Hamay's factory) would be RM3.5million. Adding that to the current assets of RM803,807.12, the total assets would be around RM4.3million. The estimated NTA value would be RM2.93million.

**[40]** Learned counsel then submitted that based on the above calculations, the estimated value of the sale shares should be:

1. RM399,998 based on the same purchase consideration of RM1 per share for the minority block of shares purchased from his mother and brother in the same year;

2. RM168,000 based on the NTA of RM0.41 per share;

3. RM2.32million based on NTA of RM5.81 per share.

**[41]** The evidence as revealed showed that Lee Chin Yee purchased 80% of Hamay for about RM40,000 when the company had an asset base of RM3.5million! This evidence alone showed that the transaction smacked of a lack of *bona fide* in the sale shares transaction.

**[42]** I agree with learned counsel for the judgment creditor that the circumstances leading to the purported sale of the sale shares are highly suspicious. The judgment debtor was aware at all material times of the suit against him and that judgment had been obtained on 29 January 2010 against him. He knew that his appeal to the Court of Appeal had been unsuccessful and so was his leave to appeal to the Federal Court. He was aware of the charging order to show cause that was served at the registered office of Hamay and also on his solicitors. He filed affidavits to oppose the charging order against his shares in Hamay. There were more than ample opportunities and indeed sufficient reasons to shift his assets away to scuttle and stymie any execution process against him by way of a charging order.

**[43]** What is more incredulous was the fact that Lee Chee Yin the owner of all the 500,000 shares in the company except for two shares allowed the judgment debtor to be the sole signatory of Hamay's bank accounts until May 2011 as teased out under cross-examination and that even after that the judgment creditor remains a joint-signatory to Hamay's bank accounts.

**[44]** The Federal Court was confronted with facts not too dissimilar in *Lin Ah Moy v. Lee Cheng Hor & Ors* [1969] 1 LNS 96. There the plaintiff's 300 shares in a private limited company were allegedly sold to her sister-in-law (the 2nd defendant) for $1 per share. There were evidence to show that the estimated value of the shares to be between $3 and $4 per share. The Federal

Court agreed with the High Court that the 2nd defendant was not a *bona fide* purchaser for value. The sale of the shares was set aside. His Lordship Gill FJ (as he then was) in delivering the judgment of the court observed at p. 102:

> The secretary of the company estimated the value of the shares to be between $3 and $4. From the evidence regarding the dividends paid, it was obvious, as the learned trial judge said in his judgment, that the shares were worth much more than twice the nominal value at which they were purported to be sold both in 1954 and 1959. His Lordship has further said: "I frankly find the evidence of the sale both in 1954 and 1959 unconvincing and incredible. One does not normally sell a goose that lays golden eggs for a little more than the price of a goose." With respect, we entirely agreed. All the brothers, including the first defendant who has been a bus conductor employed since 1949 by the bus company in which the shares are held, must be deemed to have known the real value of the shares. Even assuming that he had got the 300 shares from the original plaintiff as a gift, would he in 1959 knowing their true value have sold them at $2 per share? We did not think so.

**[45]** On the learned trial judge's finding that the 2nd defendant was not a *bona fide* purchaser for value, his Lorship observed at p. 103 as follows:

> The seventh and last ground of appeal was that on the assumption that a trust was created in 1954, the learned trial judge ought to have held that the second defendant was a *bona fide* purchaser for value without notice, and consequently took the said shares unencumbered by the said trust. We were prepared to accept for the sake of argument that the second defendant might not have had notice of the trust but the learned trial judge found as a fact that she was not a *bona fide* purchaser for value. We could not see how this court could possibly disturb that finding of fact or draw any inferences adverse to that finding.

## Contentions Raised By Judgment Debtor To Show Cause Why The Charging Order Should Not Be Made Absolute

**[46]** Learned counsel for the judgment debtor, Mr Anantha Krishnan, contended that the judgment creditor had not denied the averment of the judgment debtor that he was no longer the beneficial owner of the sale shares on 30 September 2010 when the show cause order was made as he had transferred his beneficial interest in those shares to his son. He referred to the

dicta of his Lordship Gopal Sri Ram JCA (as he then was) in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 as follows:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 45; *Overseas Investment Pte Ltd v. O'Brien* [1988] 3 MLJ 332.

**[47]** With respect, this is not a case where the judgment creditor had failed to challenge the averment of the judgment debtor that he was no more the beneficial owner of the sale shares. The challenge is writ throughout the affidavit filed in support of the *ex parte* application for the charging order to be issued in complaince with the averment that the judgment debtor is the beneficial owner of the shares that a charging order is to have effect over as required under O. 50 r. 3(c) RHC as well as in the affidavit of Loh M C affirmed on 17 December 2010 that exhibited the search made at the SSM office on 16 December 2010 showing the judgment debtor to be still the registered owner of the sale shares.

**[48]** Mr Anantha Krishnan further contended that even if the legal ownership of the sale shares had not passed until 29 December 2010 when the Form 32A had been duly witnessed and stamped, yet beneficial ownership had passed to his son on 15 January 2010.

**[49]** Learned counsel Mr Anantha Krishnan also referred to a passage in Walter C M Woon's Company Law, FT Law & Tax Asia Pacific at p. 296 where we read:

> Equitable interests in shares can arise in the same way as for any other type of property, eg, by sale or mortgage or declaration of trust. The sale of specific shares gives to the purchaser an equitable interest in the shares.

**[50]** The learned author Walter Woon also summarised the relevant facts and findings in the case of *Hawks v. McArthur* [1951] 1 All ER 22 (High Court, England) as follows at p. 296:

A The Plaintiff was the holder of a charging order affecting shares held in the name of McArthur. McArthur had previously sold the shares in question to Roberts and Fraser before the charging order was obtained, although they were not registered as holders. The question was whose interest took priority, that of the Plaintiff or that of Roberts and Fraser? A charging order only operates to charge the beneficial interest of the person against whom it is made. Therefore, if McArthur had nothing more than a bare legal title to the shares at the time the charging order was obtained, the charging order would give no right over the shares to the Plaintiff. Vaisey J held that even though the requirements of the articles with respect to the transfer of shares had not been complied with, the sale of the shares to Fraser and Roberts vested them with the beneficial interest in those shares, and accordingly the Plaintiff's charging order was ineffective to give him any right over the shares.

**[51]** I have no difficulty associating myself with the principle enunciated above. The test under O. 50 RHC is whether the shares are beneficially owned by the judgment debtor. In a case of an arm's length *bona fide* transaction where purchase price had been paid, there is no difficulty appreciating the principle that the judgment debtor may not be the beneficial owner of the shares though he is still the registered legal owner.

**[52]** However what we have here is a case where the father as a judgment debtor tried to show that there was a *bona fide* transfer of both legal and beneficial interests in the sale shares to his son when there was none and an attempt to arrange the sequence of dates in the documents to show a neat fit that would dispel all doubts and answer any queries raised. There was no evidence as to the payment in full of the purchase price of RM39,998.80 from the son (transferee) to the father (transferor).

**[53]** Learned counsel Mr Anantha Krishnan drew my attention to the High Court case of *Jin Sen Hong (1971) Sdn Bhd v. Khiing Sie Khuo (Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd, Intervener)* [1988] 1 LNS 63 where at p. 102 his Lordship Chong Siew Fai J (as he then was) said as follows:

> In the affidavit of Ung Neng Lung, the evidence, which is uncontradicted, shows that on or about 31 December 1985 the defendant Khiing Sie Khuo trading under the style of Kion Hoe Importers & Exporters was indebted to the intervener in the sum of $103,746.13, that on or about 16 January 1986 the defendant

by a letter in writing (exh 'UNL 3' annexed to Ung Neng Lung's said affidavit) pledged, *inter alia*, the shares to the intervener as security for the payment of the said debt $103,746.1. until such time when he could pay the said debt and redeem the said shares and that the certificates comprising the shares were delivered to and deposited with the intervener. It is also in evidence that the debt remains substantially unsettled and that as at 28 February 1987 the amount outstanding was $101,492.17. In relation to the shares, the intervener therefore claims priority by reason of the pledge over the plaintiff's claim under the charging order made on 6 October 1986.

**[54]** On the evidence, his Lordship held that there existed a genuine debt and a genuine pledge of the shares by the defendant to the intervener. In our case there was no genuine *bona fide* transfer of the sale shares from the judgment debtor to his son.

**[55]** The last point argued by learned counsel for the judgment debtor was that the court by requesting to hear the transferee had put the transferee in a disadvantaged position in that the transferee now would suffer extreme prejudice as he could no longer file a stop order. That is misconceived as the purpose of a stop order under O. 50 r. 11 is such that no transfer of shares can be effected without the transferee being notified. It does not prevent the shares from being registered unless the court otherwise orders.

**[56]** What the court has done is to allow him an earlier opportunity to make known his claim in the disputed sale shares. There was nothing preventing him from filing his affidavit in support of his father's application to discharge the show cause order. Likewise too the company secretary can file his affidavit as well in support of the judgment debtor. As in *Jin Sen Hong*'s case *(supra)* the transferee may file an application to intervene and be heard *via* his affidavits filed. I fail to see how the transferee has been prejudiced as any transferee knowing that his rights to the sale shares might be affected by a charging order to show cause, would want at the earliest opportunity to assert his rights in the sale shares.

**[57]** Learned counsel Mr Anantha Krishnan had asked me to decide purely based on the affidavits filed by the judgment debtor and that filed on behalf of the judgment creditor and not to consider the evidence of the transferee and the company

secretary. I wish to state that the court's request for the transferee and the company secretary to come to court to give evidence was for the purpose of shedding light on the true nature of the transaction in the transfer of the sale shares. Assuming for a moment that both the transferee and the company secretary had not come to give the evidence that they did, my decision would have been the same based on the arguments advanced above as the judgment debtor had not in my finding shown sufficient cause to the contrary on why the charging order nisi should not be made absolute.

## Pronouncement

**[58]** Based on the totality of the evidence adduced this court held that the judgment debtor had failed to show cause to the contrary as to why the charging order should not be made absolute.

**[59]** Consequently the court ordered as follows:

1. That the charging order be made absolute for the 400,000 shares of the judgment debtor in Hamay Industries Sdn Bhd;

2. That the transfer of the 399,998 units of ordinary shares in Hamay Industries from Lee Poh Heng the judgment debtor to Lee Chin Yee (judgment debtor's son) on 15 January 2010 and effected on 29 December 2010 be and is hereby cancelled;

3. That the register of members of Hamay Industries Sdn Bhd be rectified by reversing and striking out the name of Lee Chin Yee as holder of the 399,998 units of ordinary shares and by substituting *in lieu* thereof the name of Lee Poh Heng as holder of the said shares with immediate effect.

**[60]** I also ordered costs to be paid by judgment debtor to the judgment creditor in the sum of RM20,000.

**[61]** Learned counsel Mr Anantha Krishnan on behalf of the judgment debtor applied orally for a stay of the order of court. I dismissed the oral application for stay without prejudice to him putting in a formal written application and affidavit in support to show special circumstances warranting a stay.